In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 913

NAPOLEON PERSONE ZAMORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 52–60) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1966. The petition for a writ of certiorari was filed on December 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's statements referring generally to prior but related criminal acts were admissible in evidence.

2. Whether there was any unnecessary delay in taking petitioner before the nearest commissioner in violation of Rule 5(a), F.R. Crim. P.

3. Whether petitioner was denied the right to counsel.

4. Whether there was sufficient corroboration for petitioner's confessions.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of New Mexico under each count of an eleven-count indictment charging him with making false entries in the records of the federally insured bank of which he was an officer, in violation of 18 U.S.C. 1005 (Counts 1 through 8), and with embezzlement (Counts 9 through 11), in violation of 18 U.S.C. 656 (Tr. 787–788). On September 3, 1965, he was sentenced to imprisonment for an aggregate of twenty years (Tr. 797–798). The court of appeals affirmed.

The evidence showed that on April 5 and 6, 1965, the vice president of the First National Bank of Santa Rosa, a federally insured bank where petitioner was cashier, discovered false entries in the bank's records (Tr. 33, 178, 179). A call to the F.B.I. brought three agents to the bank on April 8. They were shown the bank records which revealed the discrepancies (Tr. 326). At 2:18 p.m., when he returned from lunch, petitioner was introduced to the agents and informed that they were investigating a report of irregularities and a large shortage of funds (Tr. 422–423). Special Agent Carlton advised petitioner

that he did not have to say anything; that the agents would like to discuss the matter with him; that before he made any statement he was entitled to consult an attorney or anyone else; that no threats, promises or duress would be used to get information from him; and that what he said could be used in court against him (Tr. 423). Petitioner agreed to talk to the agents (Tr. 435). At 2:45 petitioner admitted that he had made one of the false entries in question on April 5, 1965, in the general ledger sheet. Petitioner then told the agents that such irregularities covered a period of twelve years, that he alone was responsible, and that the total shortage was $257,400. Petitioner also stated that he took no cash but when taking bank funds he would make a deposit to one of his accounts (Tr. 538–540). Upon conclusion of the interview at about 3:12, petitioner was told he was in custody and would be taken to Tucumcari for arraignment. He asked if he could see his wife. Two agents went to his home with him where he spoke to Mrs. Zamora and telephoned his brother. He was returned to the bank at 3:44, and arrangements were made to take him to the office of the United States Commissioner in Tucumcari, 50 to 60 miles away. At 4:02 the agents and petitioner left Santa Rosa by car. They arrived in Tucumcari at 5:20 p.m. Petitioner was then arraigned (Tr. 541–545).

At the arraignment the commissioner explained petitioner's rights to him, including his right to an attorney. Petitioner told the commissioner he did not want an attorney, that he was guilty. Commissioner Rowley explained that he could not accept a plea and set bond (Tr. 610–611). After the formal

arraignment, petitioner and Mr. Rowley, who had known petitioner for about eighteen years (Tr. 490), sat in Rowley's office for ten or fifteen minutes, during which time the agents were in an adjoining office. Mr. Rowley advised petitioner that he needed a good lawyer (Tr. 494) and called petitioner's wife so that bond arrangements could be made. Petitioner still said that he did not want an attorney (Tr. 611–612).

Petitioner thereafter was taken into the other room where he read and signed two written statements which had been prepared by the agents. The first, Exhibit 91, pertained to the April 5, 1965, episode (Tr. 466–467). The second, Exhibit 92 (Tr. 554), stated (omitting introduction and closing recitals):

> About twelve years ago I began converting funds of the bank to my own use by putting deposit tickets to my accounts for amounts which I failed to deposit. As a result the control account for Demand Deposits was always less than the individual ledger sheets totaled. I concealed these irregularities from the Bank Examiners by removing some of the ledger sheets when they were examining the bank or by altering the ledger tapes of the balances (the tapes of the ledger card balances).
>
> The tape (shortage) for which I am responsible is about $257,400.00. Nobody else knew about this or received any of the money.

When certain of the bank's bookkeeping machine tapes were checked for accuracy they were found to have been falsified by the insertion of a disposable piece of paper so that the falsification would not appear on the tape; the asset thus segregated would

be available to the embezzler, and the bank would lose that amount (Tr. 51–68). Erasures were also found (Tr. 179). Petitioner was shown to have access to all the paper, machines, and cash in the bank (Tr. 176) and to be in control of and responsible for much of the bookkeeping. Contrary to his superior's instructions, petitioner himself ran tapes he was not supposed to run (Tr. 160, 167, 170), and his handwriting was found on tapes with false totals (Exh. 51, Tr. 161; Exh. 52, Tr. 168). On certain occasions large amounts were deposited to petitioner's accounts near the time that falsifications resulted in bank shortages.[1] As much as $4000.00 in cash was kept by petitioner and his wife at home and more—up to $3000.00—at their store (Tr. 666, 679).

ARGUMENT

1. Although petitioner's oral statement and second written confession generally referred to his prior but related criminal acts of embezzlement, their admission into evidence was proper because they embraced all of petitioner's twelve years of false entries and embezzlement, showing his method of operation and establishing his intent. *Morgan* v. *United States*, 355 F. 2d 43 (C.A. 10). Moreover, the court carefully charged the jury (Tr. 777) that such evidence was admitted only for the purpose of establishing

[1] *E.g.*, the April 5, 1965, shortage was $2980.48 and a deposit in petitioner's account of $3941.84 was made that day (Tr. 401); on December 16, 1964, a hidden bank shortage of $5000.00 occurred (Tr. 365), and on the next day a $3236.04 deposit was made to one of petitioner's accounts (Tr. 366–367).

petitioner's intent if it found that he had in fact done the acts charged.

2. Petitioner's complaint that he was not taken before a commissioner as quickly as possible (Pet. 36–39) is without merit. Although petitioner was suspected when the interview at the bank began at 2:18 p.m., he was not known to be the embezzler until his confession at 2:45. From that time until his arraignment at 5:20 p.m. the following events occurred: The interview continued until about 3:12 when petitioner was arrested but, at his request, taken home to see his wife. While there he telephoned his brother. At 3:44 he was returned to the bank and arrangements were made by telephone to meet the commissioner in his office in Tucumcari, 50 to 60 miles away. The drive to Tucumcari took one hour and eighteen minutes.

In all, from the time the confession commenced to the appearance in the commissioner's office, two hours and thirty-five minutes lapsed. No unnecessary delay was involved other than a 32-minute trip made at petitioner's request so that he could see his wife. After 3:12 no new evidence was obtained from petitioner. Clearly, no violation of Rule 5(a), F.R. Crim. P. took place; the circumstances involved in the cases cited by petitioner are plainly distinguishable.

3. Nor was petitioner denied his right to counsel. The uncontradicted evidence shows that at the beginning of the interviews by the F.B.I. agents petitioner was fully advised of his right to consult an attorney before making any statement (Tr. 535, 548, 553) and that the court would appoint an attorney for him

if he could not afford one (Tr. 491, 549, 553). Moreover, before petitioner made his two written confessions, he was specifically advised by his old acquaintance, the United States Commissioner, that he not only had a right to a lawyer, but that "he needed an attorney and a good one" (Tr. 494, 616). At that time, however, petitioner's expressed attitude was that he did not need a lawyer, that he was guilty and wanted to "get it over with" (Tr. 492, 612). Nothing in these circumstances indicates the claimed denials of petitioner's rights contrary to *Escobedo* v. *Illinois*, 378 U.S. 478, or *Miranda* v. *Arizona*, 384 U.S. 436, especially in light of *Johnson* v. *New Jersey*, 384 U.S. 719, and the fact that the trial below took place in August 1965. Nor can it be seriously contended that a banker of petitioner's experience and position did not understand the gravity of the charges against him so that his declining to call a lawyer was not a waiver of his right to call one. This is so even though he may not have known the exact charge alleged in the complaint and the range of possible defenses and punishments; he obviously knew he had committed a serious crime in misappropriating $257,400.

4. Petitioner's confessions were amply corroborated by other evidence. His written statement regarding the April 5, 1965, embezzlement was explicitly and fully corroborated by the showing of the shortage and by a corresponding deposit to one of petitioner's accounts. His oral admission and second written statement were also corroborated by evidence of other shortages and other deposits to his accounts, by the

evidence of petitioner's access to and control of all the papers, machines and cash of the bank, by his handwriting on falsified tapes, by the evidence of his handling of tapes contrary to instructions, and by the evidence of petitioner's expenditures and acquisitions of property and possession of large amounts of cash at home and at his store. In essence, petitioner's complaint about lack of corroboration and the related complaint that the government's evidence was exculpatory (because the government did not show a dollar-for-dollar transfer of embezzled funds into petitioner's accounts) are attacks upon the sufficiency of the evidence. Both courts below having found the evidence sufficient. There is no occasion for further review. *Scales* v. *United States,* 367 U.S. 203; *United States* v. *Johnson,* 319 U.S. 503.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967